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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, *et al.*,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE DEFENSE CONTRACTORS AND INDUSTRY ASSOCIATIONS IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

Amici include current and former defense contractors and associations of defense contractors who produce, or have produced, equipment under contracts with the United States government for use by the United States Armed Forces.[1] (A complete list of amici is set forth in the appendix to this brief.) In producing such equipment, amici contractors and members of amici associations frequently operate (or have operated) in close conjunction with the federal government, especially with respect to the design of such equipment. Thus, if a tort action is brought against a defense contractor alleging that equipment it produced was negligently designed and that this defect caused injury, the defendant may be able to invoke what has been referred to as a "government-contractor defense," a principle of federal law that precludes a contractor's liability when the government has approved reasonably precise specifications for the equipment. *See Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). Moreover, the lower courts have generally concluded that, in a situation where a contractor has a colorable government-contractor defense, the defendant may remove a case against it to federal court under 28 U.S.C. § 1442(a)(1), the provision at issue in this case, even if the complaint on its face does not raise a claim arising under federal law.

This particular case does not involve removal based on the government-contractor defense, and amici take no position on whether removal was proper in this case. Nonetheless, because the Eighth Circuit relied on (and, arguably, extended) the government-contractor defense cases to find removal proper in this case, this Court's decision may affect the ability of amici contractors or members of amici associa-

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[1] This brief was not authored in whole or in part by counsel for either party. No person other than amici and undersigned counsel made any monetary contribution to the preparation and submission of this brief. Letters consenting to the filing of this brief from both parties have been filed with the Clerk.

tions to remove to federal court cases filed against them in which a government-contractor defense is properly presented. Amici therefore file this brief in support of neither party but rather to inform the Court regarding certain applications of the federal officer removal statute that might not be fully aired in the parties' briefs, and to urge the Court not to disturb the consensus of the lower courts that a colorable government-contractor defense will support removal based on 28 U.S.C. § 1442(a)(1).

SUMMARY OF ARGUMENT

As the lower courts uniformly have concluded, removal is proper under 28 U.S.C. § 1442 when a defense contractor advances a colorable defense under *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). Section 1442 permits removal at the behest of a federal officer, or anyone "acting under" such a federal officer. In *Boyle*, this Court recognized that the interests of the federal government require a careful circumscription of defense contractors' liability for state-law claims. Balancing federal against state interests, the Court held that liability cannot be assessed for design defects as long as the contractor delivered equipment that conformed to reasonably precise specifications approved by the federal government.

Although the specific facts of this case do not involve the *Boyle* defense, the Court's disposition of the case could affect how the lower courts address future petitions for removal by defense contractors. This Court's Section 1442 jurisprudence, as well as the statute's text, history, and purpose, strongly suggest that this Court should not disturb the consensus of the lower courts that removal is proper when a colorable *Boyle* defense is raised. To protect legitimate state interests, this Court has allowed removal under Section 1442 only when the defendant can show a causal connection between its actions and official authority. Defense contractors satisfy this requirement—which, in its balance of federal and state interests, maps directly onto the requirements of the *Boyle* defense.

Although defense contractors are not themselves federal officers, they are "acting under" federal officers when they provide equipment conforming to government-approved specifications (as the *Boyle* defense requires). Indeed, early incarnations of the federal officer removal statute enacted during the War of 1812 and during the Civil War explicitly allowed removal by nongovernmental defendants sued for assisting federal officers in advancing war aims. Now, as then, the Armed Forces cannot operate without enlisting considerable assistance from private entities. To vindicate the purpose of Section 1442 in allowing a federal forum for the protection of genuinely federal interests, this Court should not disturb the consensus of the lower courts in permitting removal by defense contractors who advance a colorable *Boyle* defense.

ARGUMENT

I. THIS CASE MAY IMPLICATE THE AVAILABILITY OF REMOVAL UNDER SECTION 1442 FOR DEFENSE CONTRACTORS WHO POSSESS A COLORABLE DEFENSE UNDER *BOYLE* V. *UNITED TECHNOLOGIES CORPORATION*

A. Section 1442 Has Been Used By Defense Contractors To Remove Cases To Federal Court Where A Colorable Government-Contractor Defense Is Presented

Although respondent sought to remove this case under 28 U.S.C. § 1442(a)(1) based on its contention that its conduct was carried out in compliance with federal regulatory requirements, that is far from the only situation in which private parties have invoked removal under Section 1442(a)(1).[2] Many of those cases involve a distinct fact pat-

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[2] Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the

tern: defense contractors who present a colorable government-contractor defense under *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). Although the lower courts have framed the relevant test in a variety of ways, they have uniformly concluded that Section 1442(a)(1) permits removal by such defense contractors. *See infra* Part I.C.

This Court has never squarely addressed the requirements for a private party to remove a case under Section 1442(a)(1).[3] Amici therefore submit this brief to explain why the lower courts are correct in allowing defense contractors to remove under Section 1442(a)(1) and to urge this Court to dispose of this case in a way that preserves the ability of such contractors to remove their cases to federal court.

B. As This Court Recognized In *Boyle*, Federal Law Precludes Defense Contractors From Being Held Liable Under State Law For Defects In Military Equipment Manufactured Pursuant To The Government's Specifications

Defense contractors are indispensable to national security. The military cannot itself produce most of the items that it needs, and so it must rely on contractors to supply its requirements. Inevitably, however, accidents and other unfortunate incidents occur, and because of the difficulty of suing the sovereign, it is not uncommon for parties to sue private contractors, contending that they were injured by defects in the design of items that were supplied to the military.

United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[3] In *Maryland* v. *Soper*, 270 U.S. 9 (1926), the Court stated that a removal petition brought by a private chauffeur who had entered into a contract with a federal officer would be considered on the same terms as the removal petition brought by his co-defendant federal officers. *Id.* at 27, 30.

As this Court recognized in *Boyle*, such lawsuits against defense contractors—and any assessment of liability against contractors—could affect the operations of the federal government in a direct and adverse way. If a contractor were to be held liable for the manufacture of equipment that it supplied to the military pursuant to government specifications, then "either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way the interests of the United States will be directly affected." 487 U.S. at 507.

Accordingly, the Court in *Boyle* concluded that the interests of the federal government require a careful circumscription of defense contractors' liability. The Court recognized that the procurement of military equipment by the United States, and the potential liability of the private contractors who provide such equipment, are areas of "uniquely federal interest." 487 U.S. at 504-505, 507 & n.1. Therefore, the Court articulated what has become known as a government-contractor defense for situations where there is a "significant conflict with federal policy or interests." *Id.* at 509 (internal quotation marks omitted). Specifically, the Court held that liability for defects cannot be imposed pursuant to state law where three requirements are met (*id.* at 512):

- "the United States approved reasonably precise specifications";
- "the equipment conformed to those specifications"; and
- "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[4]

[4] The Court added this third requirement "because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability." *Id.*

In framing the government-contractor defense, the Court looked to the discretionary-function exception of the Federal Tort Claims Act (FTCA), which bars any tort suit against the United States that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). As the Court noted, designing military equipment is "assuredly a discretionary function," one that "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. The Court determined that if such suits were barred against the government, they should be barred against contractors as well: "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

The *Boyle* test has proven an effective means of balancing the interests of private plaintiffs with the interest of the national government in ensuring the vitality of the nation's Armed Forces. In addition to ensuring a uniform rule regarding financial liability for harm caused by defectively designed military equipment, the test has helped guard against inappropriate inquiry into military decisionmaking and judicial second-guessing of military decisions that would exceed the competence of the judicial branch.[5]

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[5] The government-contractor defense continues to play a vital role in a new era of national security concerns. In the wake of the terrorist attacks of September 11, 2001, Congress established a rebuttable presumption that the government-contractor defense applies in all cases relating to qualified anti-terrorism technologies that have been reviewed and approved by the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 863(d), 116 Stat. 2135, 2240, *codified at* 6 U.S.C. § 442(d). Because anti-terrorism technologies are often utilized

C. The Lower Courts Have Routinely Granted Removal Under Section 1442 To Defense Contractors Who Advance A Colorable *Boyle* Defense

The lower courts are uniform in holding that defense contractors can avail themselves of Section 1442.[6] For example, in *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), the Fifth Circuit granted removal to

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by private entities at risk of terrorist attack, the presumption extends to sales to such private entities. *See id.* The presumption may be overcome only by evidence that the contractor acted fraudulently or with willful misconduct in submitting information to the Secretary during his review. *See id.*

[6] *See, e.g., Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001); *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998); *Lane* v. *Halliburton*, No. Civ. A. H-06-1971, 2006 WL 2583438, at *2-4 (S.D. Tex. Sep 07, 2006); *McAboy* v. *IMO Indus.*, No. C05-1241L, 2005 WL 2898047, at *3-5 (W.D. Wash. Oct. 27, 2005); *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 446-451 (E.D.N.Y. 2004); *Crackau* v. *Lucent Techs.*, No. Civ. 03-1376 (DRD) 2003 WL 21665135, at *2-5 (D.N.J. Jun 25, 2003); *Carter ex rel. Estate of Carter* v. *Acands, Inc.*, No. 3:02-CV-00009, 2002 WL 31682352, at *3-5 (E.D. Tex. June 27, 2002); *Good* v. *Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1127-1131 (E.D. Pa. 1996); *Anderson* v. *Avondale Indus., Inc.*, No. Civ. A. 94-3021, 1994 WL 679827, at *2 (E.D. La. Dec. 5, 1994); *Guillory* v. *Ree's Contract Servs. Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994); *Crocker* v. *Borden, Inc.*, 852 F. Supp. 1322, 1327 (E.D. La. 1994); *Akin* v. *Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994); *Pack* v. *AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993); *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992); *Bahrs* v. *Hughes Aircraft Co.*, 795 F. Supp. 965 (D. Ariz. 1992); *Gulati* v. *Zuckerman*, 723 F. Supp. 353 (E.D. Pa. 1989). *But cf. Freiberg* v. *Swinerton & Walberg Property Serv., Inc.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002) (questioning in dicta whether the government-contractor defense fulfills Section 1442's federal-defense requirement); *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934, 944-945 (E.D.N.Y. 1992) (same). Judge Weinstein, the author of *Ryan*, has since held that the government-contractor defense does indeed fulfill the requirements of Section 1442. *See In re "Agent Orange"*, 304 F. Supp. 2d at 445.

In some of the above cases, courts did not in fact grant removal, on the grounds that the defendant failed to make the requisite factual showing as to one or more prongs of the Section 1442 test for removal. *See Good*, 914 F. Supp. at 1127-1131; *Anderson*, 1994 WL 679827, at *3-5; *Bahrs*, 795 F. Supp. at 970.

manufacturers of Agent Orange. Citing detailed specifications from the government regarding the design, development, and delivery of Agent Orange, the court found that "a direct causal nexus exists between the defendants' actions taken under color of federal office and [plaintiff's] claims." *Id.* at 400. The court further concluded that such evidence of the government's involvement sufficed to present a colorable *Boyle* defense. *Id.*

Although no other court of appeals has addressed the intersection of Section 1442 with the government-contractor defense, the district courts are uniform in holding that a defense contractor may obtain such removal. *See supra* p. 7 n.6. For example, in *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992), the district court granted removal to submarine builders sued by plaintiffs allegedly exposed to asbestos on Navy submarines. The court reasoned that the defendants established that they were subject to "direct and detailed control" by federal officials, who required defendants to construct and repair submarines pursuant to contractual specifications. *Id.* at 573. The court noted that "[t]he government also performed extensive dock and sea trials on the submarines prior to commission, to ensure complete conformity with design specifications." *Id.* at 572-573. The court further concluded that the above facts sufficed to make out a colorable federal defense under *Boyle*. The court dismissed plaintiff's argument that the asbestos itself was not contractually mandated, concluding that *Boyle* broadly addresses "liability for design defects in military equipment." *Id.* at 573.

II. THE INTERESTS THAT UNDERLIE BOTH THE GOVERNMENT-CONTRACTOR DEFENSE AND THE FEDERAL OFFICER REMOVAL STATUTE MILITATE IN FAVOR OF CONSTRUING THE LATTER TO ALLOW REMOVAL BY CONTRACTORS WHO HAVE A COLORABLE DEFENSE BASED ON *BOYLE*

A. The Earliest Federal Officer Removal Statutes Aimed To Ensure That The Operations Of The Federal Government Would Proceed Unhindered Despite Regional Objections To Military Policies

As this Court has recognized, the first federal officer removal statute "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular." *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969). Congress tried through various means to restrict trade with Britain during the war, in order to deny the enemy needed supplies and provisions. *See* Donald R. Hickey, *American Trade Restrictions During the War of 1812*, 68 J. Am. Hist. 517 (1981). With the defeat of Napoleon in 1814, British veterans began arriving *en masse* in Canada, leading to a surge in illicit cross-border trade. *See id.* at 534. Customs officials possessed only limited authority to seize goods and were subject to state-court damages actions even where merchandise they seized was condemned and forfeited. *See id.* at 534-535.

To ensure more effective prosecution of the war against Britain, Congress passed legislation designed to expand federal customs officials' power to seize goods that appeared to be on their way to the enemy and to authorize federal customs officers to enlist private assistance in enforcing those duties. *See* Act of Feb. 4, 1815, 3 Stat. 195. To protect both public and private officials from retaliation for their actions in support of the war effort, Congress allowed removal by "any [customs] collector, naval officer, surveyor, inspector, or any other officer, civil or military, *or any other person aiding or assisting*, . . . for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof." *Id.* § 8, 3 Stat. 198 (emphasis added).

Likewise, midway through the Civil War, Congress enacted another federal officer removal statute expressly designed to prevent interference with the war effort, which had been beset by numerous instances of state courts allowing lawsuits to proceed against federal officers for the performance of their duties in prosecuting what was often an unpopular war. *See* James G. Randall, *The Immunity Act of 1863: A Study in the Wartime Immunity of Government Officers*, 20 Mich. L. Rev. 589 (1922). In the very same statute in which Congress ratified President Lincoln's suspension of the writ of habeas corpus, Congress provided that (1) in any civil or criminal action, the defendant could interpose a defense that his actions were performed either pursuant to a presidential order issued during the rebellion or under color of federal law, and (2) a state-court lawsuit filed against "any officer, civil or military, or against *any other person*" for any wartime acts under color of presidential or congressional authority could be removed to federal court. *See* Act of Mar. 3, 1863, §§ 4-5, 12 Stat. 755, 756 (emphasis added). In so doing, Congress effectively created a defense from liability for those who aided the war effort and allowed both federal employees and private citizens to remove cases to federal court to avail themselves of that defense.

The current federal officer removal statute is the descendant—though much expanded—of those specialized wartime statutes. In 1948, Congress dramatically expanded the removal statute to its current breadth, allowing removal by *all* federal officers and those who act under them. *See Willingham*, 395 U.S. at 405-406 (summarizing history of the federal officer removal statute).

B. The *Boyle* Test Is Fundamentally The Same As The Test This Court Has Applied For Removal Under Section 1442

The purpose of the federal officer removal statute is to protect the exercise of legitimate federal authority against witting or unwitting interference by individual states through their courts. *See, e.g., Arizona* v. *Manypenny*, 451 U.S. 232, 241-242 (1981); *Colorado* v. *Symes*, 286 U.S. 510,

517 (1932). At the same time, the statute does not wholly displace state authority whenever a federal officer, or person acting under that officer, is haled into court. *See, e.g.*, *Mesa* v. *California*, 489 U.S. 121, 125-139 (1989); *Symes*, 286 U.S. at 518. Recognizing that Congress did not intend to override state interests whenever a case involves a federal officer or one acting under such an officer, the Court has emphasized that Section 1442(a)(1) by its terms allows removal only for an act "under color of such [federal] office." The Court has interpreted the requirement of an act "under color of" federal office to mean that the removing defendant must demonstrate not only (1) a "causal connection between the charged conduct and asserted official authority," *Willingham*, 395 U.S. at 409, but also (2) a colorable federal defense, *see Mesa*, 489 U.S. at 125-139. A mere federal connection is not enough for removal: the Postal Service employee who commits a traffic violation while delivering the mail cannot remove to federal court absent any colorable showing that the alleged infraction was justified by federal law. *See id.* at 125-139.

The Court's construction of "under color of [federal] office" in Section 1442(a)(1) maps directly onto the contours of the *Boyle* defense. The Court addressed the same federalism concerns implicated in its Section 1442 jurisprudence—and essentially struck the same balance—when it articulated the elements of the government-contractor defense in *Boyle*. The *Boyle* Court essentially mandated just such a "causal connection" by rejecting a broad rule that would have displaced state law whenever a defense contractor is sued for harm arising out of a purchase pursuant to a government contract:

> [I]t would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a

> significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

487 U.S. at 509. This is akin to saying that there is no tie to any "asserted official authority" where the "charged conduct"—the defective product design—caused injury by its inclusion in standard equipment that the government did not design or specify but merely ordered from a catalogue. By contrast, when the contractor works intensively with the government to design and manufacture a precision-crafted item to suit the military's specific needs, any resultant injury *is* causally connected to the exercise of official authority in designing the features of that product. Accordingly, the *Boyle* defense is limited to contexts where the federal government approves "reasonably precise specifications" and the defense contractor delivers equipment that conforms to those specifications.

Therefore, the articulation of a *Boyle* defense meets the first of the Court's requirements for removal under Section 1442 as set forth in *Willingham* and *Mesa*: the causal connection to official authority. And, by definition, it also meets the second requirement: a colorable federal defense.

C. A Contractor Who Presents A Colorable *Boyle* Defense Is "Acting Under" A Federal Officer

Of course, defense contractors who seek removal under Section 1442(a)(1) are not federal officers themselves, and so they must avail themselves of the "acting under" clause of that subsection. Petitioners have argued in their petition for certiorari that the court of appeals misinterpreted that phrase in holding that respondent "acted under" a federal officer by complying with certain Federal Trade Commission regulations. *See* Pet. 18-25. Amici express no view on that aspect of petitioners' argument. Amici do urge the Court, however, not to disturb the consensus of the lower courts that a defense contractor who delivers a product that con-

forms to reasonably precise specifications approved by the government is indeed "acting under" a federal officer.

As a threshold matter, the "acting under" language should be read to encompass private parties—and it appears that neither party, nor the Solicitor General, disputes that point. Indeed, this Court has stated that a petition for removal by a private chauffeur contracted by a federal officer would be considered on the same terms as a petition brought by the officer himself. *Maryland* v. *Soper*, 270 U.S. 9, 27, 30 (1926); *see also Davis* v. *South Carolina*, 107 U.S. (17 Otto) 597, 600 (1883) ("[T]he protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty."); *cf. City of Greenwood* v. *Peacock*, 384 U.S. 808, 814-824 (1966) (referring to the history of the federal officer removal statute in concluding that a subsection of the civil rights removal statute, 28 U.S.C. § 1443(2), applies to private persons only insofar as they act in association with federal officers).[7]

In addition, the "acting under" clause is not limited to situations where the private party takes part in the *enforcement* of federal law, such as the enforcement of criminal or customs laws. Although the earliest federal officer removal statutes were indeed limited to assistance in enforcing wartime prohibitions and the collection of revenue, the dramatic expansion of the statute in the Judicial Code of 1948, as part of a sweeping revision and recodification of Title 28, enlarged the class of persons who may claim "acting under" status. *See* Pub. L. No. 80-773, 62 Stat. 869, 938 (1948). Immediately prior to the 1948 revision, Section 1442(a) was lim-

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[7] In addition, the statute should be construed to apply to corporations as well as natural persons. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .") The context provides no contrary indication: a corporation may take instructions from, and act on the behalf of, a federal officer just as readily as an individual.

ited to revenue officers and persons acting under them. The House Committee on Revision of the Laws, which drafted the revision to Section 1442(a), concluded that "[n]o basis is apparent for including some [federal officers] and excluding others." Committee on Revision of the Laws, House of Representatives, *Revision of Federal Judicial Code: Preliminary Draft* (1945), at 277. Accordingly, Congress expanded the statute to include all federal officers. As the Solicitor General noted in his brief respecting the petition for certiorari, "[b]ecause the 'acting under' clause in Section 1442(a) is directly linked to the set of federal officers who may remove, the 1948 expansion of the class of covered officers necessarily effected a corresponding expansion of the class of private parties who may remove." U.S. Cert. Br. 17-18. Because Section 1442(a) now covers all federal officers, it now applies to all persons "acting under" them, regardless whether they are engaged in classic enforcement activity.

This case does not present an occasion for an attempt at a comprehensive definition of "acting under" in Section 1442(a)(1), but whatever else it may mean to act under a federal officer, the proper construction of the phrase should include defense contractors who produce equipment to the government's specifications. The process by which the Armed Forces acquire equipment from their contractors is intricate and often involves close interaction between the government and the contractors, with the military retaining and using its ultimate authority at every step. Under Department of Defense Instruction 5000.2, Operation of the Defense Acquisition System ("DoD Instruction 5000.2"),[8] the defense acquisition process is divided into three phases: Technology Development, System Development and Demonstration, and Production and Deployment, each of which is highly collaborative in nature.[9] Each phase involves one or

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[8] *Available at* http://www.dtic.mil/whs/directives/corres/pdf/i50002_051203/i50002p.pdf.

[9] *See, e.g.*, DoD Instruction 5000.2, at 3.6.1 ("Technology Development is a continuous technology discovery and development process re-

more "decision points," at which point the government decides whether to continue, advance, or terminate a project or program work effort or phase.[10] According to the government's Defense Acquisition Guidebook,[11] "[t]he review associated with each decision point typically addresses program progress and risk, affordability, program trade-offs, acquisition strategy updates, and the development of exit criteria for the next phase or effort." Defense Acquisition Guidebook 10.1. These reviews are supervised by the Under Secretary of Defense for Acquisition, Technology, and Logistics, *id.* at 10.2, and often result in significant revisions to the project.

What is crucial about this interactive process is that the government is using contractors to *obtain* something that the government needs and is monitoring the process to ensure that the equipment delivered by the contractor does indeed meet the government's requirements. When the government contracts with a private entity to provide it with military equipment, it is essentially using private resources to assist in the execution of a discretionary function of the government—as this Court recognized in *Boyle*.

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flecting close collaboration between the S[cience] & T[echnology] community, the user, and the system developer. It is an iterative process designed to assess the viability of technologies while simultaneously refining user requirements.").

[10] *See, e.g., id.* at 3.7.4 ("The Design Readiness Review during [System Development and Demonstration] provides an opportunity for mid-phase assessment of design maturity as evidenced by measures such as the number of subsystem and system design reviews successfully completed; the percentage of drawings completed; planned corrective actions to hardware/software deficiencies; adequate development testing; an assessment of environment, safety and occupational health risks; a complete failure modes and effects analysis; the identification of key system characteristics and critical manufacturing processes; an estimate of system reliability based on demonstrated reliability rates; etc. Successful completion of the Design Readiness Review ends System Integration and continues the [System Development and Demonstration] phase into the System Demonstration effort.").

[11] *Available at* http://akss.dau.mil/dag/welcome.asp.

Where the government enrolls a private contractor to produce equipment that the government would otherwise produce itself, and the contractor delivers equipment that conforms to the government's reasonably precise specifications, it is fair to conclude that the contractor has "acted under" a federal officer.

D. Policy Considerations Weigh In Favor Of Allowing Defense Contractors To Remove

Several policy considerations support a construction of Section 1442(a)(1) that would allow contractors asserting a colorable *Boyle* defense to remove cases to federal court. All of these considerations stem from the fact that the Constitution entrusts the national defense to the federal government rather than the several States. *See, e.g.*, *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871) (federal control over Armed Forces is "plenary and exclusive" and "without question from any State authority"). The federal interest is therefore at its strongest, and federalism concerns at their weakest, where military operations, including procurement, are involved.

First, the essential truth underlying *Boyle*—that liability imposed upon defense contractors who manufacture products to government specifications is essentially liability imposed upon the government—militates in favor of allowing removal. A state court's failure to recognize a valid government-contractor defense could harm the federal government. As this Court recognized in *Boyle*, assessment of liability on defense contractors would cause contractors to either decline to enter into future contracts or increase the charge to the government for the contracts they accept. 487 U.S. at 507. Either outcome could make it more difficult for the military to obtain the equipment that it needs.

Second, the government's involvement in approving the design of military products means that the assessment of costs on contractors through civil liability would inevitably involve second-guessing, by various juries across the country, of the discretionary decisions that went into the design process. The second-guessing of such discretionary deci-

sions is precisely what Congress sought to avoid in creating the discretionary-function exemption to the FTCA. *See Boyle*, 487 U.S. at 511 ("the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function."); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (discretionary-function exemption in FTCA was designed "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."). As this Court has stated, such analysis "would seriously handicap efficient government operations." *United States* v. *Muniz*, 374 U.S. 150, 163 (1963).

Third, even if the defense contractor eventually prevailed, either at trial or upon appeal, a state court's failure to recognize and give effect to a government-contractor defense before trial could hamper military effectiveness. Indeed, this Court has held that certain types of claims fall outside of the FTCA because they "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Shearer*, 473 U.S. 52, 57-59 (1985). Even though a suit against a defense contractor seeking redress for alleged defective design or failure to warn may appear to be a garden-variety tort suit, litigation of the case may involve a detailed inquiry into the reasons why the military decided to order or use a particular design or type of equipment. These issues implicate "subtle[] and professional decisions as to the composition, training, equipping, and control of a military force [which] are essentially professional military judgments, subject always to civilian control." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Fourth, there is a uniquely important interest in ensuring that the Armed Forces are subject to a uniform national body of law. Such uniformity could be undermined if the courts of the fifty States were all responsible for determining whether a defendant has established the elements of the government-contractor defense. Such a patchwork quilt could hamstring the military in its dealings with contractors

and, ultimately, undermine the national defense. *Cf.* The Federalist No. 29 (Hamilton) (praising "uniformity in the organization and discipline of the militia" and noting that "[t]his desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority").

Fifth, as has been true since the War of 1812, not every military decision enjoys widespread national support, and the degree of support often varies across regions. Channeling lawsuits involving the military into the federal system, which is better equipped to withstand sectional hostility, conforms to the purposes of the federal officer removal statute. Indeed, as this Court has noted, the predecessors of that statute "were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power." *Symes*, 286 U.S. at 517.

CONCLUSION

For the reasons stated above, amici submit that the Court, however it disposes of this case, should preserve the availability of removal under Section 1442 for defense contractors who present a colorable defense under *Boyle*.

Respectfully submitted,

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APPENDIX

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Amici consist of the following corporations and associations:

1. *Electronic Industries Alliance* comprises nearly 1,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. The Alliance is composed of four sector organizations: the Electronic Components, Assemblies and Materials Association; the Government Electronics and Information Technology Association; the JEDEC Solid State Technology Association; and the Telecommunications Industry Association.

2. *General Dynamics Corporation* employs approximately 81,000 people worldwide and had 2006 revenues of $24.1 billion. The company provides mission-critical information systems and technologies; land and expeditionary combat systems, armaments and munitions; shipbuilding and marine systems; and business aviation. Approximately 68 percent of the company's revenue is derived from contracts with the U.S. government, 10 percent is derived from work with non-U.S. governments, and the balance from commercial customers around the world.

3. *General Electric Company* has long supported the U.S. government across a wide range of products and services, including jet engines, power generation and nuclear power technologies, energy-related services, water treatment technologies, lighting, non-destructive test equipment and technologies relating to Homeland Security, healthcare and biosciences. As of 2005, GE was the 17th largest U.S. government contractor with over $3.5 billion in sales under U.S. government prime contracts and subcontracts.

4. *Hercules Incorporated* previously supplied materials to the United States Armed Forces.

5. *Lockheed Martin Corporation* is principally engaged in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services. The corporation reported 2006 sales of $39.6 billion of which approximately 84 percent were made to the United States Government.

6. *Monsanto Company*, a corporation headquartered in Missouri, has asserted the government-contractor defense to several state-law tort actions and has removed those actions to federal court on that basis.

7. *National Defense Industrial Association* is a non-partisan, non-profit organization with a membership that includes almost 1,400 companies and over 43,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Its members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors.

8. *Northrop Grumman Corporation* is a $30 billion global defense and technology company whose 120,000 employees provide innovative systems, products, and solutions in information and services, electronics, aerospace and shipbuilding to government and commercial customers worldwide.

9. *Oshkosh Truck Corporation* engages in the design, manufacture and marketing of various commercial, fire and emergency, and military trucks; vehicle bodies; access equipment; portable and stationary concrete batch plants; and mobile medical trailers. Its Defense segment manufactures heavy- and medium-payload tactical trucks.

10. *Raytheon Company* is an industry leader in defense and government electronics, space, information technology, technical services, and business aviation and special mission

aircraft. Raytheon employs 80,000 people worldwide and reported revenues of $20.3 billion in 2006.

11. *Teledyne Technologies Incorporated* is a provider of electronic components, instruments and communications products, including defense electronics, monitoring and control instrumentation for marine, environmental and industrial applications, data acquisition and communications equipment for aircraft and components, and subsystems for wireless and satellite communications. Teledyne also provides systems engineering solutions and information technology services for defense, space and environmental applications, and manufactures general aviation and missile engines and components.

12. *United Technologies Corporation* is one of the ten largest U.S. defense contractors in annual sales to the Department of Defense. UTC subsidiaries Sikorsky Aircraft Corporation and Hamilton Sundstrand Corporation provide helicopters and a variety of aerospace systems, respectively; UTC's Pratt & Whitney division supplies engines for a variety of combat and transport aircraft.